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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 73-31

STATE OF NEW JERSEY and HOWARD YEAGER,

Principal Keeper of the New Jersey State Prisons,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel. ISIAH MACON

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

Docket No.

STATE OF NEW JERSEY and HOWARD YEAGER,

Principal Keeper of the New Jersey State Prisons,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel. ISIAH MACON

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, State of New Jersey and Howard Yeager, Principal Keeper of the New Jersey State Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 30, 1973. That judgment reversed the judgment of the United States District Court for the District of New Jersey, filed January 13, 1972, denying Petitioner's (Macon's) application for a Writ of Habeas Corpus, and remanded the cause to the District Court for action consistent with the opinion of the Circuit Court. The aforesaid judgment of the United States Court of Appeals for the Third Circuit is appended as Appendix A. hereto.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix B. The opinion of the United States District Court for the District of New Jersey appears in 336 *F.Supp.* 69 (D.N.J. 1972). The opinion of the New Jersey Supreme Court appears in 57 *N.J.* 325, 273 A.2d 1 (1971).

JURISDICTION

The judgment of the United States District Court for the District of New Jersey was filed January 13, 1972. The judgment of the United States Court of Appeals for the Third Circuit, reversing the District Court judgment, was entered on March 30, 1973. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

I. Should the scope of review in a collateral proceeding be restricted to an examination of whether the state court applied the proper legal standard?

II. Did the prosecutor's comment in summation rise to the level of constitutional error, and, if so, did the Circuit Court apply the proper standard of review in determining it was harmless error beyond a reasonable doubt?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Const., Amend. V.:

> "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

United States Const., Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been peviously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

28 *U.S.C.*§1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: . . ."

28 *U.S.C.*§2241:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

*** * ***

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) . . .

(2) . . .

(3) He is in custody in violation of the Constitution or law or treaties of the United States; . . ."

28 *U.S.C.*§2243:

"**A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto:**

* * *

The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

Defendant, Isiah Macon, was convicted of manslaughter. His conviction arose from a shooting which occurred in the early morning of May 30, 1968. Defendant had been involved in a minor collision with a vehicle operated by one Abrahms. While defendant and Abrahms were debating whether there was damage to defendant's car, the deceased, a friend of Abrahms, came to the scene and entered the discussion in support of Abrahms. The deceased appears to have had too much to drink. Defendant, too, had been drinking, but he did not contend he was under the influence of liquor. The State's proof was that when the deceased placed his hand in a friendly way upon defendant's shoulder, defendant stepped back, drew a gun and fired two shots into decedant; that friends of deceased jumped upon defendant to subdue him; that some additional shots were fired aimlessly in the struggle.

On the other hand, defendant testified that as he tried to leave to telephone the police with respect to the collision, the deceased suddenly punched him in the chest; that defendant, backing away, drew the weapon to frighten the deceased; that someone grabbed defendant from behind, causing the gun to be fired; that as the men grappled, the gun was discharged several more times. In short, defendant denied that he pulled the trigger and insisted the firing was caused by the physical activity of others.

When the deceased collapsed, his friends turned to attend him. Thereupon, defendant and his two companions drove off. Defendant said he drove aimlessly; that he threw the gun away during the ride; that he abandoned the car at a place he could not recall; that later that morning his wife told him the police were outside their home; that he then telephoned his lawyer.

During his summation to the jury, the prosecutor made the following remarks concerning Macon's actions after the shooting:

> "Then what does he do? He drives along and can't tell us where. The gun goes out the window. An act of innocence?
>
> "The car is left somehwere and he doesn't

remember where. An act of innocence?

"He goes home and puts the shirt down in the chest, a torn shirt. Then he goes to bed. He says he had trouble sleeping. He gets up the next morning and lo and behold, what does he do? He calls his lawyers. These are acts of innocence?

"I say, ladies and gentlemen, his story is implausible, impossible and you can judge by his own conduct, unbelievable."

Defendant made no objection to the comment and did not request the trial court to give any instructions to the jury regarding it. On appeal to the Appellate Division of the New Jersey Superior Court, defendant contended for the first time that the above comments constituted an infringmenet of his Sixth Amendment right to counsel. Both the Appellate Division, Superior Court, and the New Jersey Supreme Court, affirmed defendant's conviction.

Having exhausted his State remedies, Macon sought federal habeas corpus relief pursuant to 28 *U.S.C.*§2241 *et seq.*, asserting the same Sixth Amendment claim first raised in the Appellate Division, Superior Court. In an opinion and order by the Honorable Clarkson S. Fisher, District Judge, the District Court denied the writ, holding that although constitutional error was committed:

"There is ample evidence to support petitioner's conviction and I do not believe that the prosecutor's comment in any way contributed to the jury's decision." 336 *F.Supp.* at 74.

The judgment of the District Court was reversed by the Court of Appeals, which agreed with the District Court that the prosecutor's comment to the jury was constitional error, but was unable to conclude that such error was harmless beyond a reasonable doubt, under the test propounded in *Chapman v. California*, 386 *U.S.* 18 (1967). The Circuit Court thus reversed

the judgment of the District Court, and remanded the cause to the said District Court for further action.

This petition by the State of New Jersey follows.

REASONS FOR GRANTING THE WRIT

POINT I

THE SCOPE OF REVIEW IN A COLLATERAL PROCEEDING SHOULD BE RESTRICTED TO AN EXAMINATION OF WHETHER THE STATE COURT APPLIED THE PROPER LEGAL STANDARD.

Substantial interests of federalism and comity militate for a narrow scope of collateral review of state court judgments of conviction. Traditionally, the writ of habeas corpus was not available as a routine vehicle of federal review of state court decisions. If a state court had honestly applied the pertinent doctrines to the best of its ability, an accused was held to have been accorded the full measure of his constitutional rights. *Schechtman v. Foster,* 172 *F.2d* 339 (2nd Cir. 1949) *cert.* den. 339 *U.S.* 924 (1950) (L. Hand, J.). See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 *Harv. L. Rev.* 441 (1963).

In 1963, this Court in *Fay v. Noia,* 372 *U.S.* 391, *Townsend v. Sain,* 372 *U.S.* 293, and *Sanders v. United States,* 373 *U.S.* 1, broadened the permissible scope of review in a habeas corpus proceeding. Such an expansion of the traditional habeas remedy is an unnecessary detriment to the judicial system, and a threat to the very concept of federalism. This case presents this Court with an opportunity to clarify the responsibility of the lower federal courts in a proceeding involving a collateral attack on a state court conviction, and to limit their prerogative to those cases where intervention is necessary to vindicate a constitutional right gone unrecognized by the state courts.

As it exists today, a petition for a writ of habeas corpus has become a routine vehicle for review of state criminal judgments. Such a perversion of the great writ has resulted in a serious backlog in the lower federal courts, and has substantially increased the workload of this Court. *Cf.* Daub, *The Case Against Modern Federal Habeas Corpus,* 57 *A.B.A.J.* 323 (1971). Simply put, the

"one more appeal" status currently afforded the habeas remedy has contributed to the federal courts' inability to discharge its business. See *United States ex rel. Seamen v. Cryan*, 329 *F.Supp.* 875 (D.N.J. 1971); *United States ex rel. Troy Victor v. Yeager*, 330 *F. Supp.* 802 (D.N.J. 1971).

Other serious ramifications have also been attributed to the present status of federal collateral review. There exists the real danger expressed by Justice Jackson in *Brown v. Allen*, 344 *U.S.* 443 (1953), (dissenting opinion), that "the occasional meritorious petition (will) be buried in a flood of worthless ones." *Id.* at 537. Lack of certainty and finality minimizes the deterrent effect of punishment and inhibits rehabilitative efforts. Retrial in state courts places an additional burden on the state law enforcement system and becomes difficult or impossible with the passage of time. State federal relations suffer when lower federal courts in essence, overrule the highest state court. See Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgment*, 38 *U. Chi. L. Rev.* 142, 155 (1970); *cf. Schneckloth v. Bustamonte*, ——— *U.S.* ——— (1973) (Powell, J., concurring).

In the present case, the Appellate Division, Superior Court, and the Supreme Court of New Jersey fully and carefully considered defendant's constitutional claims applying the pertinent federal constitutional standard. The State Supreme Court found no Sixth Amendment violation, but nevertheless condemned the remarks of the prosecutor as improper. The Court also held that even if the error were assumed to be of constitutional proportion it was "satisfied beyond a reasonable doubt that the prosecutor's comment, however understood, was thoroughly harmless." *State v. Macon*, 57 *N.J.* at 335, 273, *A.* 2*d. at 5.* In short, defendant was afforded a fair opportunity to litigate the issue at every level of the state courts1 and his claim was found lacking in merit.

Nevertheless, by labeling his claim of error in the prosecutor's summation as "constitutional," defendant was allowed to relitigate this same claim through the federal courts. The Federal District Court also found the alleged error to be harmless, albeit constitutional. But defendant ultimately prevailed in the Circuit Court. While characterizing the opinion of

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1. Due to defendant's failure to object at trial, the trial court did not have occasion to directly pass upon this claim.

the New Jersey Supreme Court (by Weintraub, C.J.) as "well reasoned and articulate," and tacitly recognizing that the finding of the State Court was not unsupported by the record, the Circuit Court on its view of the record, was "unable to conclude that the prosecutor's comment was 'harmless beyond a reasonable doubt.' " (Opinion, Appendix B.). Petitioners urge that once the Circuit Court determined that the State Court had fairly considered defendant's claims, applying the correct legal standard, its function on review of a state judgment was properly completed. It should have had no occasion to go further and substitute its subjective judgment for that of the State Supreme Court.

The determination of whether error may be deemed harmless involves not so much an application of a precise rule of law, as a value judgment upon a factual complex. See R. Trayner, *The Riddle of Harmless Error*, 14-15 (1970). In reviewing state convictions on federal habeas corpus, federal judges are thus asked to do no more than substitute their subjective evaluations for those of the State Court. If the lower federal courts stand in "review" of all state courts, there is no logical reason to retain criminal appellate jurisdiction in the states. The duplication of effort is wasteful. Moreover, the assumption of expansive jurisdiction by the lower federal courts through habeas corpus proceedings relegates the state's judiciary to a subservient position. It is inconceivable that a federal judge is gifted with that enlightenment which enables him, as a single individual, to effectively overrule all the state judges who previously passed on the same question, often without any disagreement among themselves. *Cf. State v. Funicello*, 60 *N.J.* 60, 286 *A.2d 55 (1972)*.

That an issue of federal law may be raised does not, in itself, justify such review. State courts, equally with federal courts, have an obligation to guard, enforce, and protect every right secured or granted by the Federal Constitutional. *Irvin v. Dowd*, 359 *U.S.* 394 (1959). Only when it appears that the state courts have failed to make a good faith effort to perform this task, should there be occasion for review in the federal courts. So long as the state courts fulfill their task of finding the facts and applying the law, there should be a presumption against mere repetition of the process in federal courts on the alleged grounds that error, after

all, could have occurred. See Bator, *supra* at 453.

It has frequently been argued that not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus after a conviction has become final. See *e.g.*, *Kaufman v. United States*, 394 U.S. 217 (1969) (Black, J., dissenting); *Schneckloth v. Bustamonte, supra*. Indeed, judicial discretion is implicit in the statutory command that the judge, "dispose of the matter as law and justice require." 28 *U.S.C.*§2243. See *Kaufman v. United States, supra* at 232.

Petitioners therefore urge this Court, in an exercise of its supervisory power over federal courts, to reconsider the scope of review of state judgments on federal habeas corpus and limit such review to those cases where the state court has failed to apply the correct constitutional standard. See *Sup.Ct. Rule* 19 (b).

POINT II

THE PROSECUTOR'S COMMENT IN SUMMATION DID NOT RISE TO THE LEVEL OF CONSTITUTIONAL ERROR AND WAS HARMLESS ERROR BEYOND A REASONALBE DOUBT.

In recent years there has been a marked proliferation of constitutional rights, "a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis." *Schneckloth v. Bustmonte, supra,* at ——— (Powell, J., concurring). Thus the denial of an adequate opportunity to impeach [2] and violations of the hearsay rule [3] are presented as an infringement of the Sixth Amendment right to confrontation; inflamatory summations, erronous jury charges [4] and errors in identification procedures [5] are characterized as a denial of due process; and instructions to deadlocked juries and undue participation by the trial judge in examining witnesses are asserted as a denial of the Sixth Amendment right to a jury trial.[6] In this same vein in the present case, an isolated remark of the prosecutor in summation, in which he suggested that a series of actions by defendant, culminating in a telephone call to his lawyer, were indicative of his guilt of the crime charged, has been deemed a violation of his Sixth Amendment right to counsel. (See Opinion, Appendix B.) This holding is so unprecedented an extension of the right to counsel under the Sixth Amendment as this right has been construed by the State and Federal courts as to call for review by this Court under an exercise of its supervisory power. *Sup. Ct. Rule* 19 (b).

The right of a defendant in a state criminal proceeding to counsel is well established and beyond question. See *e.g., Powell v. Alabama,* 287 *U.S.* 45 (1932); *Gideon v. Wainwright,* 372 *U.S.* 335 (1963); *Argesinger v. Hamlin,* 407 *U.S.* 25 (1972). However,

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2. *Smith v. Illinois,* 390 *U.S.* 129 (1968).
3. But see *California v. Green,* 399 *U.S.* 149 (1970)
4. *In re Winship,* 397 *U.S.* 358 (1970)
5. *Stovall v. Denno,* 388 *U.S.* 293 (1967).
6. See Friendly *supra* at 156.

defendant did not claim that he was denied counsel at trial or that counsel was for any reason ineffective. Nor did defendant contend that at any time prior to trial, when the investigation began to "focus" on him,he was denied the fullest protection of counsel as guaranteed under *Escobedo v. Illinois*, 378 *U.S.* 478 (1963) and its progeny. At the time defendant called his attorney (prior to his arrest) he was in fact not guaranteed the right to counsel under the Sixth Amendment. *Hoffa v. United States*, 385 *U.S.* 293 (1966).

Indeed, the Circuit Court based its finding of unconstitutional error solely on the fact that the prosecutor's remarks may have penalized defendant for the exercise of his constitutional right to counsel. The court found no direct authority for this holding, and relied entirely on the analogy it drew with improper comment on a defendant's failure to testify in violation of the Fifth Amendment. *Griffin v. California*, 380 *U.S.* 609 (1965).

It is submitted that the Circuit Court's decision was wholly erroneous and tantamount to an *ad hoc* creation of new constitutional rights. The Circuit Court's analysis hinged on the finding that in the present case, as in *Griffin, supra*, a penalty was exacted for the exercise of a constitutional right. However valid this analysis might be when applied to comment on failure to testify, it fails in the present context of a claim based on the right to counsel.

The argument that guilt should be inferred from the failure of a defendant to testify in his own behalf has inherent persuasive force. It is consonant with common experience to expect one to deny false allegations and to come forth with exculpatory proof, if any exists. Clearly in the search for truth, a defendant's own testimony would be invaluable. The failure to provide testimony naturally gives rise to an inference against the silent party and thus comment on such failure can weigh heavily against a defendant, who, under the Fifth Amendment, has no obligation to testify. The penalty analysis is clearly valid when applied to a Fifth Amendment claim.

On the other hand, the fact of seeking counsel in the face of

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7. Defendant did not deny shooting the deceased but claimed that it was accidental. Thus regardless of whether he believed himself to be guilty or innocent, defendant was faced with a legal problem in view of which the only logical course of action was to seek counsel.

legal predicament[7] is as consistent with innocence as with guilt. An invitation to infer guilt on this basis is inherently illogical and unpersuasive. Thus, the New Jersey Supreme Court noted:

> "But as to consulting counsel, it would be a rare man who would find in that cirumstance anything beyond the bland fact of an awareness of involvement in a legal predicament. If prospective jurors were asked whether they would think it evidence of consciousness of guilt that a man involved in a shooting affair telephone his lawyer, it would be surprising if any answered that he would. Indeed, it is not unusual for a defendant to attack a confession before a jury on the claim that his demand for counsel was ignored, and this is done without a fear that the jurors may think the call for counsel was itself incriminating." *State v. Macon, supra,* 57 *N.J.* at 332.

The penalty argument thus fails, and unless the mere incantation of a constitutional right is sufficient to raise a constitutional issue, it would appear that none was raised. It is likewise submitted that the Circuit Court misconstrued the degree of possible harm required in order to reverse a conviction under the harmless error test of *Fahy v. Connecticut,* 375 *U.S.* 85 (1963) and *Chapman v. California, supra.*[8] In *Chapman* this Court made it clear that:

> "There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22.

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8. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviciton." *Fahy, supra.* at 86-87; *Chapman, supra* at 23.

If in fact the comments of the prosecutor in the present case amounted to constitutional error, it was clearly error of the insignificant sort which this Court in *Chapman* deemed harmless. As previously noted the remark was inherently illogical and lacking in persuasive force. Moreover, it was but an isolated comment in an extended summation. In contrast, this Court characterized the remarks in *Chapman* as, "a machine-gun like repetition of a denial of constitutional rights, designed and calculated to make petitioner's version of the evidence worthless." *Id.* at 26.[9] So too, in *Chapman*, unlike the present case, the trial court reinforced the prosecutor's remarks, charging the jury that it might infer guilt from defendant's silence.

In short, there is no support in law or fact for the finding of the Circuit Court. There was clearly no reasonable possibility that the error affected the verdict.

Respondents recognize that this Court is not primarily concerned with correction of errors in lower court decisions. *Cf. Dick v. New York Life Ins. Co.*, 359 *U.S.* 437, 452-454 (1959) (Frankfurter, J., dissenting). The Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 *U.S.* 220, 227 (1925). However, the disparate results obtained in the courts below evidence a basic conflict in principal between decisions of the highest state court and the Circuit Court in the application of the harmless error rule. The recent decisions of this Court [10] have made it clear that the possibility of injustice must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it would not otherwise have reached, to require reversal. The Circuit Court's application of the rule does not appear to give sufficient emphasis to this factor, thus requiring a lesser degree of possibility of harm for reversal.

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9. The remarks of the prosecutor which directly relate to defendant's failure to testify on her own behalf occupy some 16 pages in the Appendix to the Court's opinion. 386 *U.S.* at 26-42.

10. See *e.g.*, *Harrington v. California*, 395 *U.S.* 250 (1969); *Milton v. Wainwright*, 407 *U.S.* 271 (1972); *Schneble v. Florida*, 405 *U.S.* 427 (1972); *Brown v. United States*, ——— *U.S.* ——— (1973).

Giving due deference to the impossibility of delineating precise guidelines to control appellate discretion in the evaluation of error, it is nevertheless urged that the present case provides the Court with an opportunity to clarify the standard of review for harmless error, last propounded in *Chapman v. California, supra.* Such guidelines are of particular significance since all fifty states are obliged to apply the federal standard for *Chapman v. California, supra,* at 21. Evaluation of error as harmless or prejudicial is one of the most significant, as well as the most complex tasks assigned to an appellant court. In view of the present trend, which finds an increasing number of criminal procedural rights to be constitutionally based, and the recognized impossibility of a "perfect trial," it is of considerable importance that the harmless error rule be well defined and consistently applied. To this end, it is urged that review of this rule by the Court is appropriate in context of the present case.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals
for the Third Circuit

No. 72-1170

UNITED STATES OF AMERICA,
ex rel, ISIAH MACON,

Appellant

vs.

HOWARD YEAGER, Principal Keeper
of the New Jersey State Prison

(D. C. Civil Action No. 605-71)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE ----- DISTRICT OF NEW JERSEY
Present: ADAMS and GIBBONS, Circuit Judges
and LAYTON, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ---- District of New Jersey and was submitted on briefs, and argued on reconsideration by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 13, 1972, be, and the same is hereby reversed, and the cause remanded to the said District Court for action consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:
THOMAS P. QUINN
CLERK

March 30, 1973

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 72-1170

UNITED STATES OF AMERICA,
ex rel. ISIAH MACON,

Appellant

v.

HOWARD YEAGER, Principal Keeper
of the New Jersey State Prison,

(D.C. Civil Action No. 605-71)

On Appeal from a Judgment of the United States District Court for the District of New Jersey

Submitted October 17, 1972

Argued on Reconsideration January 17, 1973

Before: ADAMS and GIBBONS, Circuit Judges and LAYTON, District Judge

---

OPINION OF THE COURT

(Filed March 30, 1973)

STEPACOFF, KOCH and KROOP
Perth Amboy, New Jersey

JOHN S. KUHLTHAU
Middlesex County Prosecutor
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ADAMS, ***Circuit Judge***

In this appeal, the petitioner seeks review of a decision by the district court[1] denying his application for a writ of habeas corpus. This Court is urged to hold that petitioner's constitutional rights were violated and that error, not harmless in nature, was committed, when at his state trial the prosecutor commented during his summation to the jury that petitioner consulted an attorney the day after the alleged crime was committed and suggested that from this the jury should question the innocence of petitioner.

Petitioner, Isiah Macon, was convicted in state court of manslaughter and sentenced to serve a term of not less than seven nor more than ten years. It appears that petitioner and one Abrahms had been in a minor traffic accident in New Brunswick, New Jersey. The deceased, Ralph Sasso, arrived at the scene of the accident and became involved in the discussion between Macon and Abrahms. Both Sasso and Macon had been drinking that evening. During the ensuing altercation Sasso was killed by Macon's gun.

The details of the events leading up to Sasso's death are in dispute. The state's evidence indicates that when, in the course of the argument, Sasso placed his hand on Macon's shoulder Macon

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[1] United States ex rel. Macon v. Yeager, 336 F.Supp. 69 (D.N.J. 1972).

stepped back, drew a gun, shot Sasso twice, and then drove away with friends. Petitioner's version of the events indicates that Sasso interfered in a racially abusive and aggressive manner, punched Macon twice, assaulted Macon with the help of friends, and was shot by Macon's gun, which was fired accidentally by Macon during the course of the struggle.

It is uncontradicted that after the incident, Macon and his friends drove away and Macon instructed them to give no statements and to take no action until he had consulted his attorney. Macon testified that, alone, he then drove aimlessly around, threw the gun out the car window, parked his car in a place he could not recall, walked home, put his blood-stained shirt away, went to bed, and the next morning telephoned his lawyer and was later arrested.

In view of the different accounts of what had happened at the time of the shooting, it thus became crucial for the jury to determine which charactrerization of the facts was true, the state's or Macon's. If the jury credited the state's evidence, it could very well have brought in a verdict of murder. On the other hand, a belief in petitioner's testimony and other defense evidence might have supported the view that Sasso's death was either accidental or the result of Macon's attempt to repel aggression.

During his summation to the jury, the prosecutor commented upon Macon's actions following the shooting incident:

> "Then what does he do? He drives along and can't tell us where. The gun goes out the window. An act of innocence?
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> "The car is left somewhere and he doesn't remember where. An act of innocence?
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> "He goes home and puts the shirt down in the chest, a torn shirt. Then he goes to bed. He says he had trouble sleeping. He gets up the next morning and lo and behold, what does he do? He calls his lawyer. *These are acts of innocence?* (Emphasis added)
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> "I say, ladies and gentlemen, his story is implausible, impossible and you can judge by his own *conduct*, unbelievable." (Emphasis added)

The defendant made no objection to the comment and did not request the trial judge to offer any instruction to the jury regarding it.

Macon's appeal of his manslaughter conviction to the Appellate Division of the New Jersey Superior Court was rejected. The conviction was later affirmed by the New Jersey Supreme Court, *State v. Macon*, 57 N.J. 325 (1971), which lowered his term of incarceration from seven to ten years to two to seven years.[2]

Having exhausted his state remedies, Macon sought federal habeas corpus relief, asserting that the prosecutor's statement about his call to a lawyer violated his sixth amendment right to counsel, as applied to the states through the fourteenth amendment. The district court denied the writ, holding that, although constitutional error was committed, "the effect on the trial was not sufficiently prejudicial as to require the granting of petitioner's request for the Writ." 336 F. Supp. at 71.

It should be noted that petitioner does not argue that he was denied counsel or that his defense was presented by a lawyer of less than adequate ability. Rather, Macon claims that the prosecutor's statement concerning his telephone call to counsel sought, or at least may reasonably be expected to have tended, to raise in the minds of the jurors an inference of guilt and, as a result, penalized him for the exercise of his constitutional right to counsel.

Few cases deal directly with the question whether a prosecutor's comment to the jury concerning a defendant's exercise of the right to counsel is constitutional error. The district

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[2] In addition to covering at some length the constitutional right and harmless error issues raised in the present appeal, *infra*, the New Jersey Supreme Court discussed the point that by failing to object and to request a disapproving instruction concerning the prosecutor's comment, Macon waived his right to claim error. 57 N.J. at 333-35. Although the state has an interest in treating errors raised at trial differently from those not timely challenged, see Henry v. Mississippi, 379 U.S. 443, 452 (1965), federal courts considering habeas corpus petitions are not bound by the state procedural rule and must permit a petitioner to raise constitutional issues for the first time in the federal proceeding so long as state procedures have not been deliberately bypassed. See, e.g., Fay v. Noia, 372 U.S. 391 (1963). There is nothing in the record to indicate that any deliberate bypass occurred in this case. Accordingly, there is no warrant for remanding the cause to the district court to deal with this matter.

court concluded that *Griffin v. California*, 380 U.S. 609 (1965), presented a situation sufficiently analogous to require recognition that constitutional error was committed here.

In *Griffin*, the prosecutor stressed the defendant's failure to take the stand and urged upon the jury the inference that such failure demonstrated the defendant's inability to deny his guilt. Holding such prosecutorial comment violative of the fifth amendment privilege against self-incrimination, the Supreme Court deemed the statement "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 300 U.S. at 614.

The *Griffin* Court focused its inquiry upon whether the petitioner had been "compelled . . . to be a witness against himself," *U.S. Const. amend. V*, whereas in the present case, the relevant constitutional provision called into question is the sixth amendment right to counsel. For the purpose of the "penalty" analysis, however, we perceive little, if any, valid distinction between the privilege against self-incrimination and the right to counsel. It can be argued, with equal vigor and logical support, as to either the *Griffin* situation or the present case, that a prosecutor's comment seeking to raise in the jurors' minds an inference of guilt from the defendant's constitutionally protected conduct constitutes a "penalty" on the free exercise of a constitutional right.[3]

If we were writing on a tabula rasa, the "penalty" argument perhaps could be examined from different viewpoints. One mode of analysis would focus upon the *person* asserting that his rights have been "penalized" and determine whether he has been adversely affected by the state's use of his constitutionally protected conduct. An alternative analysis would focus upon the particular constitutional *right* in question and determine whether, and if so to what extent, the state's use of constitutionally protected conduct has or will "burden" the right, i.e., deter the defendant or others from engaging in the particular constitutionally protected activity.

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[3] *See* Baker v. United States, 357 F.2d 11, 13-14 (5th Cir. 1966); Fagundes v. United States, 340 F.2d 673, 677 (1st Cir. 1965); Jones v. United States, 296 F.2d 398, 408-11 (D.C. Cir. 1961) (Fahy, J. dissenting), *cert. denied*, 370 U.S. 913 (1962); Commonwealth v. Haideman, 281 A.2d 757 (Pa. Sup. Ct. 1971) (affirmed by equally divided court) (Roberts, J. dissenting); *cf.* Sharp v. United States, 410 F.2d 969, 972-73 (5th Cir. 1969) (Brown, C.J. dissenting).

The *Griffin* majority has accepted the former analysis, at least in the criminal context. In contradistinction to the "absolutist" approach to the "penalty" question employed by Justice Douglas in *Griffin*, Justice Stewart, in a dissenting opinion in *Griffin*, urged utilizing an approach that would examine "the concept of compusion (within) reasonable bounds," 380 U.S. at 620, and would measure the advantages and disadvantages of a rule permitting the prosecutor or judge to comment upon a defendant's silence at trial. His view, however, was not accepted by the majority.

It would appear that the "absolutist" *Griffin* approach to the "penalty" argument has been diluted somewhat in other contexts. *See Shapiro v. Thompson*, 394 U.S. 618, 634, 638 n. 21 (1969) (right to travel interstate); *Walker v. Yucht*, No. 4483, F.Supp. (D. Dela., filed) (3-judge court.). Whatever the proper "penalty" approach may be under different circumstances, however, *Griffin* holds broadly that, at least in the criminal context, the relevant question is whether the particular *defendant* has been *harmed* by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has or will *burden* the exercise of the constitutional *right*. This particular "penalty" analysis would appear to apply equally to the present case as to the *Griffin* situation.

Thus we are constrained to agree with the district court that the prosecutor's comment to the jury was constitutional error. However, we are unable to conclude, as the district court did, that such error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The Supreme Court has stated that an error of constitutional dimension is not harmless if "there is a reasonable possibility that (it) might have contributed to the conviction" *Fahy v. Connecticut*, 375 U.S. 85, 86-7 (1963). The state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."- *Chapman, supra* at 24.

In the present case, because critical portions of the evidence were disputed, the credibility of the petitioner as a witness was a central issue. This is not a situation where the case against the petitioner was otherwise "so overwhelming" that the constitutional error did not, beyond a reasonable doubt, contribute to the conviction. *Cf. Milton v. Wainwright*, 407 U.S. 371 (1972);-

Harrington v. California, 395 U.S. 250 (1969). The prosecutor's comment concerning Macon's consultation with counsel the day after the shooting incident would appear to have been directed to, and may have had the effect of, raising in the jurors' minds the inference that petitioner was, or at least believed himself to be, guilty.[4] Such an inference might certainly tend to cause the jury to disbelieve Macon's version of the story. Under these circumstances, the possibility of prejudicial impact is present and we, therefore, are unable to conclude that the prosecutor's comment was "*harmless beyond a reasonable doubt.*"

We recognize that in reversing the district court's harmless error ground for decision this Court may be thought to be simply substituting its subjective judgment for that of the district court and the state courts. Thus, the New Jersey Supreme Court, in a well-reasoned and articulate opinion by Chief Justice Weintraub, concluded, much like the district court judge, that the prosecutor's comment was "thoroughly harmless" because "the point defendant attributes to the prosecutor was indeed pointless and a jury would readily understand this to be so. Nor does the

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[4] Evidence concerning Macon's consultation with counsel was injected into the case by the prosecutor during cross-examinaton of petitioner:

Q. You told (your companion) not to tell anyone about this?

A. I said don't say anything about it until I see my lawyer.

"Q. When did you first get ahold of your lawyer?

"A. The next morning.

"Q. As to your arrest?
"A. Before my arrest.

"Q. When is the next time that you knew for sure that Mr. Sasso was shot?

"A. When the police picked me up and take me to Somerset jail down there.

"Q. If that is so, why did you call (your lawyer) at seven o'clock before they picked you up? Why did you call your lawyer before they picked you up if that is so?"

result of the trial even faintly suggest harm. Defendant fared as well as he could have hoped." 57 N.J. at 335.

While the error may not have contributed to petitioner's conviction, this Court is simply unable to conclude, on the basis of an independent examination of the record, that "there is (not) a reasonable possibility that (it) might have contributed to the conviction," and this is the test mandated by the Supreme Court in *Fahy v. Connecticut*, 375, U.S. 85, 86-7 (1963). Frequently, appellate courts are called upon, in performing an appropriate reviewing function, to determine whether any error that has been committed may be adjudged "harmless." So often, this is an assignment not free from deep concern. But because it is required, we must resolutely and objectively discharge it, whatever our own personal predilections may be.

The judgment of the district court will be reversed, and the case remanded to the district court for action consistent with this opinion.